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In the Supreme Court of the United States

No. 227

OCTOBER TERM, 1958.

DR. ALEXANDER V. SPAETH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals. For the Sixth Circuit.

Petitioner, Dr. Alexander V. Spaeth, prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit, to review the decision and the judgment of that court and the order denying petitioner's application for rehearing in case No. 13381 on the docket of that court, entitled Dr. Alexander V. Spaeth vs. United States of America, which affirmed a judgment of the United States District Court for the Northern District of Ohio, Eastern Division, finding and adjudging the petitioner guilty of the offense of perjury.

OPINIONS OF COURTS BELOW.

The decision and opinion of the United States District Court for the Northern District of Ohio, Eastern Division, is unreported and is printed in the Appendix hereto, page 1a.

The opinion of the United States Court of Appeals for the Sixth Circuit is likewise unreported and is printed in the Appendix hereto, page 21a.

The petitioner was twice previously convicted and on each of two prior appeals the judgment of the United States District Court was reversed and the cause remanded for a new trial.

The opinion of the United States Court of Appeals on the first appeal, *Spaeth vs. United States*, was reported in 218 Fed. 2d 361, and is printed in the Appendix hereto, page 11a.

The opinion of the United States Court of Appeals on the second appeal, *Spaeth vs. United States*, was reported in 232 Fed. 2d 776, and is printed in the Appendix hereto, page 16a.

JURISDICTION.

Jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit, is conferred on this Court by the Act of June 25, 1948, Chapter 646, Sec. 1, 62 Stat. 928, Title 28 U. S. C., Sec. 1254. The portion of that section pertinent to jurisdiction in this review, provides as follows:

> "Cases in the Courts of Appeals may be reviewed by the following methods:
>
> 1. By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree."

QUESTIONS PRESENTED FOR REVIEW.

Where an indictment for perjury is brought against a highly reputable physician, who has specialized for more than 20 years in the practice of dermatology in the City of Cleveland, and where the indictment charges that the defendant physician, who was subpoenaed to appear as a witness in a federal district court case involving a charge

of bank robbery, wilfully and corruptly altered his medical record for the purpose of furnishing an alibi for one of the alleged bank robbers, and wilfully and corruptly gave false testimony concerning the alleged altered date on his medical record;

And, where the defendant physician denies that there was any such alteration as alleged, and asserts that his testimony on the bank robbery trial was then, and at all times, believed by him to be true;

And, where the only evidence offered by the Government both upon the issue of the falsity of the defendant's testimony and upon the issue of the defendant's wilful and corrupt intent in giving such testimony, consisted of the defendant's medical record containing the disputed entry, and of the testimony of two handwriting experts who examined the defendant's medical record, took photographs of it and conducted various experiments with it under infra-red and ultra-violet light, and who gave their opinion concerning the disputed entry, which was contradicted by other expert testimony, the following questions are presented:

I. Where no other evidence whatever is offered in support of the claim that the defendant wilfully altered his medical record to supply an alleged criminal with an alibi, and wilfully and corruptly testified falsely concerning his medical record, may a jury be permitted to speculate concerning the intent of the defendant upon the basis of evidence consisting only of the disputed record itself and the opinion of handwriting experts with respect to the disputed record?

II. When in a perjury prosecution the law requires the commission of the offense to be established by the direct testimony of at least two witnesses, or the direct testimony of one witness together with other corroborating evidence, is the testimony of a handwriting

expert who examines and experiments with the disputed record and offers an opinion based upon such examination and experimentation, direct testimony within the requirement of the rule?

III. When, in such case, there is a complete absence of evidence in the record—

(a) that the defendant knew of the occurrence of the bank robbery—

(b) that the defendant knew of the date of the bank robbery—

(c) that the defendant knew of the date of any offense charged against the person on whose behalf he had been subpoenaed to testify—

(d) that the defendant knew that he had been subpoenaed to testify in a criminal case—

(e) that the defendant knew, or had any reason to believe, that he was being called to testify as an alibi witness—

(f) that the defendant knew, or had any reason to believe, that the alleged altered and disputed date on his medical record was material or important to the testimony given by him—

(g) that the defendant ever spoke with the alleged bank robber, except on the few occasions when he came as a patient to the defendant's office.

(h) that the defendant ever spoke to or with any other person, at any time, concerning the alleged bank robber.

(i) that the alleged bank robber was anything other than a total stranger to the defendant, and that the defendant had any motive whatsoever to commit perjury for the benefit of a total stranger.

1. Was not the jury improperly required to speculate or to guess with respect to the existence of knowledge on the part of the defendant, without which

knowledge the defendant could not formulate a wilful and corrupt intent, to furnish a perjured alibi?

2. Was not the jury improperly permitted to infer the existence of knowledge upon the part of the defendant in the complete absence of evidence upon which any such inference could be based?

3. In order to determine the existence of a wilful and corrupt intent upon the part of the defendant to give false testimony, was not the jury improperly required to base inference upon inference?

4. Was it not manifest error to deny the defendant's repeated motions for judgments of acquittal?

IV. When in such case the evidence disclosed that the defendant physician had examined and treated 3000 patients in a period of three months, between the date of the disputed entry and the date upon which his testimony was given, and when, to support his honest belief in the truthfulness of his testimony, the defendant offered in evidence a large number of his medical records, including others made on the date of the bank robbery, all of which contained scratching out and alterations of dates, as well as of other material, on such records:

1. Was it not prejudicial error to refuse to admit such records in evidence for the purpose of establishing the existence of a custom or habit of the defendant, upon the issue as to whether the alteration of the date in question was made in accordance with such custom or habit, or was made with corrupt intent—

2. Was it not prejudicial error to refuse to admit such records in evidence upon the issue of whether the defendant's testimony concerning the alteration of the date in question was given mistakenly or by inadvertence, but honestly?

In the above case, the defendant's medical record was brought by him into the U. S. District Court in response to a subpoena which he received requiring him to produce that record as a witness in the case of the United States vs. Julius A. Petro, et al.

After the record had been received in evidence in that case, it was surreptitiously seized by agents of the Federal Bureau of Investigation and flown to the office of the Bureau in Washington, where it was subjected to photography and various tests conducted by agents of the bureau. It was then returned to the U. S. District Court in Cleveland.

All of this was done in the midst of the trial of the Petro case, without any application having been made to the court, without the knowledge or approval of the court, without the consent of the defendants in that case, and without the consent of the defendant herein, who was a witness in that case.

When the trial of that case was concluded and the defendant's medical record had served its purpose as evidence therein, it was again seized by agents of the Federal Bureau of Investigation. Return of the record to the defendant herein was refused.

When an indictment was returned against the defendant in this case, the defendant, in advance of the trial of this case, presented a motion to suppress evidence and to return to him his medical record. That motion was overruled. The motion was renewed at the outset of the trial and again overruled.

Objection to the introduction of the record in evidence in this case was made during the trial on the ground that the record had been procured by unlawful seizure and was offered in violation of the defendant's rights under the Fourth and Fifth Amendments to the United States Con-

stitution. The objection was overruled. On this state of the record, the following questions are presented:

Va: Was the seizure of the defendant's medical record by F. B. I. agents during the course of the trial of the Petro case, and the removal of such record from the jurisdiction of the court without the knowledge, consent or approval of the court in such case, an unlawful and unreasonable seizure in violation of the rights of this defendant under the Fourth Amendment of the United States Constitution?

Vb: Was the refusal of the Government to return to the defendant his medical record, after it had been delivered by him to the court pursuant to subpoena served upon him in the Petro case, and after the conclusion and final determination of that case, an unlawful and unreasonable seizure in violation of the defendant's rights under the Fourth Amendment of the United States Constitution?

Vc: Did the trial court commit error prejudicial to the defendant when the court overruled defendant's motion to suppress evidence, consisting of defendant's aforesaid medical record, in advance of the trial of the cause, and thereafter overruled defendant's objection to the introduction in evidence of said medical record upon the trial of the cause, in violation of the defendant's rights under the Fifth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States, Fourth Amendment:

"The rights of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, sup-

ported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Act of June 25, 1948, Chapter 645, Sections 1, 62. Title 18, U. S. C. Section 1621:

"Whoever, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise provided by law, be fined not more than $2000.00 or imprisoned not more than 5 years, or both."

HISTORY OF THE CASE.

The defendant was indicted on June 22, 1952. The case first came on for trial on November 13, 1953, and following a trial of one week, a verdict of guilty was returned on December 3rd. On appeal to the Court of Appeals for the Sixth Circuit, the judgment of the district court was reversed, for error in the charge of the court.

The case was tried a second time beginning May 23, 1955. Again, after a trial of one week, a verdict of guilty was returned. On a second appeal to the Court of Appeals, the judgment of the district court was reversed for error in the conduct of the trial judge in unreasonably and improperly restricting cross-examination of a witness for the Government.

The case was tried a third time, beginning April 23, 1957, and again, after a week's trial, a verdict of guilty was returned after the jury had been permitted to deliberate for one and one half days. On the third appeal, the judgment of the district court was affirmed.

STATEMENT OF THE CASE.

This is a unique and unparalleled case, not only with respect to the evidence received, but also with respect to the application to that evidence of important legal principles by the United States District Court and by the Sixth Circuit Court of Appeals.

The defendant, Dr. Alexander V. Spaeth, is a physician and surgeon, a graduate of the Medical School of Western Reserve University, one of the world's leading medical schools. He interned at the Research and Educational Hospital at Chicago, and undertook intensive post graduate study, both in New York and abroad in the field of dermatology. He has specialized in the practice of der-

matology in the city of Cleveland for more than 25 years. He is a member of the staff of Doctors Hospital in Cleveland Heights, Ohio; and the evidence of character witnesses presented by him, including members of the staff of that hospital, patients, and others who worked with him in a professional capacity, establishes the fact that the defendant has a reputation for outstanding medical ability and unimpeachable honesty and integrity. One of his daughters, who worked from time to time as a secretary in her father's office, and who testified in this case, is a graduate of one of the leading private girls' schools in the state, Laurel School in Shaker Heights, Ohio. At the time the doctor testified as a witness in the Sanzo case, she was a student at the Royal Academy in London, England.

On August 12, 1952, the defendant first became acquainted with the man, Joseph Sanzo, for whose benefit he is alleged to have perjured himself. Sanzo came to the defendant's office to be treated for a serious and painful skin condition. The condition was so serious that Sanzo was advised by the defendant to do no work.

The defendant examined Sanzo at his office and treated him there seven times, in August and September, 1952. Other than these seven occasions, he did not speak with Sanzo, nor did he see him anywhere until he appeared in court as a witness on December 8, 1952. Sanzo was a total stranger to the defendant prior to the time he came to his office for treatment, where he had been referred as one of approximately 1000 patients whom the doctor examined and treated each month.

The doctor kept two types of office records relating to his practice. One was an appointment book which he maintained for a period of one year; the other was a card file. For each patient there was a cardboard folder placed

in the file, and in the folder were one or more cards bearing notations concerning the patient's medical history, diagnosis and treatment.

There was only one such card in Sanzo's case. The doctor had an exceptionally large practice. It was not unusual for him to examine and to treat 30 or more patients a day. The entries on his medical record card were sometimes by himself and sometimes by his secretary. They were made sometimes on the same date on which the patient was examined, and sometimes on a subsequent date.

Because he was so busy, the doctor's medical records were sloppy, frequently corrected and frequently incomplete. He generally used a rubber date stamp to indicate on the card the date of examination, but this practice also had frequent exceptions and in many instances, as indicated on the record of Sanzo himself, a date was written instead of being stamped. Frequently the rubber date stamp did not make a full and complete impression. On such occasions it was the practice of the doctor to write in the date after using the stamp.

The record card of Joseph Sanzo, upon the basis of which the Government's claims in this case rest, contains other changes besides the alleged change of the material date.

On December 4, 1952 a subpoena was served at the defendant's office at 2:25 P. M. The receipt of this subpoena was the first occasion since Sanzo had last been in the defendant's office on September 24th, that the doctor had the name of this patient in any way called to his attention. The subpoena itself is of some considerable significance. It contains on the first printed line at the top the words "Civil Subpoena to produce document or object."

The title of the case in which the subpoena was issued was "United States of America vs. Julius A. Petro, et al." The subpoena commanded the doctor to appear in the United States District Court on the day following that upon which he was served, namely, on December 5, 1952, and "bring with you your office records, files, documents and memoranda showing your treatment of Joseph J. Sanzo beginning with August 12, 1952 to the present time, said records also to indicate treatment furnished and number of visits made by patient to your office from August 12, 1952 to the present time."

There is no evidence that the doctor spoke with anyone regarding this subpoena or regarding his testimony prior to the time he appeared on the witness stand. There is no evidence that the doctor knew what the connection of Joseph J. Sanzo was with the case of the United States of America vs. Julius A. Petro, et al. There is no evidence that the doctor ever heard of, or in any way, knew about the crime for which Sanzo was then being tried. There is no evidence to indicate that the presence of the doctor on the witness stand, together with his record "to indicate treatment furnished and number of visits made" by Sanzo to the doctor's office, was anything more than a routine recitation of diagnosis and treatment such as doctors are called upon to describe on the witness stand on numerous occasions.

When the doctor first took the witness stand in the Sanzo case, it was on the morning of December 8, 1952. He was asked to refer to his records and to state how many times he had treated Sanzo. He answered that question by referring to his record. He testified that the second time he saw Sanzo was on August 14th, but when asked concerning the time when he saw Sanzo on that date, he was unable to do so.

The doctor testified that he had an office appointment book that would indicate the time, but testified that he had not brought in his appointment book but simply his case record. He said he had examined the appointment book and that the time listed was ten o'clock, which was approximately the time of the occurrence of the offense for which Sanzo was then being tried. He was asked to return in the afternoon and to bring with him his appointment book, which he did.

A page from the doctor's appointment book, bearing, at the top the printed date August 14, 1952, was received in evidence as Government's Exhibit 36. That sheet contains the name of Joseph Sanzo, indicating that he had an appointment at the doctor's office at 10:00 o'clock on that day.

The indictment in this case is based upon the answers to six questions which were propounded to the defendant on cross-examination when he appeared as a witness pursuant to subpoena in the case of United States vs. Petro, et al. These questions and answers are set forth in the indictment as follows:

> "Q. Now, I want to call your attention to this record (Government's Exhibit 31, the defendant's medical record of Joseph Sanzo), you have some changes there, is that correct?
>
> A. Yes.
>
> Q. I want you to look at the record and indicate to the court and jury—in addition to the stamped date somebody has written over the stamped date on that particular day?
>
> A. They have.
>
> Q. Do you know what date was stamped over before that was written there?
>
> A. It was the 14th.
>
> Q. How do you know that?

A. It was put in by myself at the time of the visit. That happens often, the stamp is incomplete or fades, and I write over it.

Q. When did you do that?

A. At the time of the visit.

Q. Then this date of August 14th—somebody has inserted a "4" after the "1" on the August 14 in ink, isn't that correct?

A. That's right."

It is then charged in the indictment that the defendant knew that the testimony above quoted was false and untrue, for the reason that he knew that the stamped date on the record card was August 18 and not August 14.

To prove these charges the Government offered two witnesses. Both of them were handwriting experts: one, George F. Mesnig, was an agent of the Federal Bureau of Investigation, the other, Joseph Tholl, was a resident of Cleveland. Curiously, Tholl had been called to testify by Sanzo's attorney in the Sanzo case, and then had presented testimony with respect to the doctor's medical record of a directly contradictory nature.

The first of these witnesses to examine, check and experiment with the doctor's medical record was George Mesnig. On the night of December 8, 1952, that record was taken out of the court room of the United States District Court in Cleveland by F. B. I. agents. No application for this extraordinary action was made to the court. It was done without the knowledge or consent of the court, without the knowledge or consent of the defendants in that case and, of course, without the knowledge and consent of the doctor.

The record was flown to Washington and that night was examined there under infra-red light and under ultra-

violet light. Infra-red photographs and ultra-violet photographs were taken and on the following day the medical record was returned to the court room.

The witness arrived at certain opinions and conclusions. These he first gave when he was summoned by the Government to testify in the Petro-Sanzo trial, as a result of the investigation which had been conducted under his supervision in the F. B. I. laboratory at Washington. On cross-examination, he stated the sum and substance of his testimony (Record, pgs. 225 and 226):

"Q. The first time you gave any testimony under oath in connection with this Exhibit, was when?

A. December 9, 1952, at the bank robbery trial in Cleveland.

Q. That was in the trial of Petro and Sanzo?

A. That's right.

Q. At that time you expressed an opinion that you saw on that card the outlines of a stamped figure "8," did you not?

A. No, I don't believe so. I believe I stated I saw a well-rounded figure which could be either a "6" or an "8," probably an "8." That is my recollection of what I testified to. I believe the record will probably speak better than my recollection.

Q. That is, as a matter of fact, approximately what you said today?

A. That is true.

Q. You say the outline of a figure which could be either "6" or "8," is that right?

A. Yes.

Q. So that is just your opinion?

A. That's right."

The medical record card itself is in evidence as Government's Exhibit 31, and a photograph of it appears at page 450 of the record.

It is not physically possible to determine simply from looking at the card whether anything at all is under the handwritten "4" appearing on the date of August 14, 1952 on that card. After hours of study, the F. B. I. agent was able to arrive only at the indefinite and uncertain opinion above quoted.

Because of his specialized knowledge he was able to arrive at certain opinions and conclusions which were based largely upon the experiments conducted with infra-red and ultra-violet light and photography. Without such specialized forms of examination, Mesnig was unable even to have an opinion concerning what was claimed to be on the doctor's medical record (Record p. 184):

> "Q. Now, in the course of your microscopic examination under visible light, will you tell the court and jury what you discovered with respect to Exhibit 31?
>
> A. Well, with respect to Exhibit 31, when I examined it under the microscope, I actually saw more of interest under the ultra-violet light than I did with the white light. However, the white light gave me an idea of what actually appeared under that handwritten '4' which appeared in the August 14, 1952 date. Actually, I could see at the bottom of the '4' the outline of another handwritten figure which was on top of the original stamped date which appeared on that particular exhibit. The bottom of that particular handwritten figure showed me that it was either the bottom of a '6' or an '8.'"

The testimony of the Government's remaining expert witness, Joseph Tholl, consisted chiefly of his conclusions with respect to what he found to be both stamped and handwritten figures under the handwritten "4" on the doctor's medical record. These conclusions were based upon infra-red photographs of the record and upon an

examination of it under infra-red light, and also upon an examination of the record under ultra-violet light, and an examination of extra blue sensitive film.

The testimony of the Government's expert witnesses was directly contradicted by expert witness, A. Paul Tincher, of Cleveland, an examiner of questioned documents for over 30 years. This witness flatly denied the presence of either stamped or handwritten numerals on the doctor's record, as claimed by the Government's experts, and testified that it was his firm opinion that the lines on the record which the Government's witnesses referred to as a round-bodied figure, were nothing more than an ink run.

To establish the truthfulness of his testimony that the mark made by his date stamp was frequently "incomplete or fades," "and I write over it"; and to establish also his belief in the truthfulness of this statement, which was alleged in the indictment to have been intentionally false, the defendant offered in evidence a large number of his medical record cards, many of which contained notations made on the disputed date, August 14, 1952.

All of these cards contained dates partially written in ink and partially stamped, dates which were obviously corrected in one way or another, and a large number of corrections of various kinds. They were not offered to prove the correctness of any entry thereon, but to prove the truthfulness of the doctor's statement concerning what regularly took place in his office.

The trial court sustained the Government's objections to the introduction of all of these records. The defendant himself did not testify. At the time of the trial he was suffering from a serious and acute heart condition, and documents are in the record disclosing that he had suffered from such a condition for a long period of time. In

fact, at one point, the trial had to be delayed for almost two hours when the defendant suffered a heart attack.

The evidence disclosed that between the 14th of August and the 8th of December, 1952, the doctor treated in his office approximately 3000 patients. There was no evidence offered to establish that the doctor had any reason to recall particularly the treatment or the dates of treatment of Joseph Sanzo, any more than he would the treatment or the dates of treatment of any other patient.

There was no evidence offered to establish that the doctor had any independent recollection of Joseph Sanzo or of the treatment or dates of treatment of that patient.

There was no evidence offered that the doctor in testifying on the trial of the Sanzo case was stating anything except what appeared on his office records.

There was no evidence offered that Joseph Sanzo was not in the doctor's office on August 14, 1952.

There was no claim made and there was no evidence offered that the doctor had any motive whatever for the commission of the alleged offense.

ARGUMENT.

QUESTION RELATING TO THE ELEMENT OF INTENT.

The trial court charged the jury as follows (Record, 418a, 419a):

> "It is essential that each element of the offense charged must be established beyond a reasonable doubt to warrant a verdict of guilty. Those essential elements as they are applicable to this case, are as follows:—
>
> "* * * (4) that the defendant made the false statement under oath, as alleged in the indictment, wilfully and with knowledge of its falsity, or without believing it to have been true."

Two questions of law of paramount importance are thus presented:

First, is it not essential that the Government offer *some* evidence, whether direct or circumstantial, to establish that vital element of the offense of perjury, namely, that the defendant did not believe his testimony to be true?

Second, in a perjury prosecution is it sufficient for the Government to introduce evidence to establish the falsity of the defendant's testimony and to rest its case on that evidence alone? In such a case, in the total absence of any evidence bearing upon the defendant's state of mind at the time he gave his testimony, may the jury be permitted to infer, merely from evidence of falsity, that the defendant did not in fact believe his testimony to be true?

The instant case is unique among perjury prosecutions in that the charges against the defendant rest only in part upon the claim that he gave, as a witness, wilfully false testimony.

It is not only charged that the defendant testified falsely on the trial of the Sanzo case, but it is also charged that preparatory to giving this testimony in the district

court, the defendant intentionally altered his record for the purpose of supplying Joseph John Sanzo with an alibi.

This Court might well conclude that the Government should have had in its possession, and offered in evidence, some reasonably pertinent persuasive and convincing evidence to establish these accusations against a physician of outstanding integrity and reputation in his community.

But to establish the intent with which the defendant is alleged to have altered his record, the Government relied only upon the testimony of two handwriting experts that there had been a change in the record.

Obviously, the handwriting experts could testify to nothing more.

On the basis of this testimony the trial court permitted the jury to speculate regarding the intent with which the defendant's testimony had been given, and on the basis of this testimony the Court of Appeals has ruled that there was evidence in the record sufficient to present a perjury question.

The defendant contends that on this state of the record there was no case to submit to the jury. It is, of course, true that direct evidence of intent can seldom, if ever, be offered. However, the variety of circumstances which may be established by evidence and from which the defendant's state of mind may be inferred are legion. By the same token, before the jury may be permitted to infer the existence of a particular state of mind of the defendant, which the jury must infer before the defendant can be convicted of perjury, *some* of these circumstances *must* be established by appropriate and sufficient evidence.

Surely, before the jury could be permitted to infer from the evidence in the case, that the defendant's testimony as a witness was corruptly and intentionally false, the jury was first required to find from competent evi-

dence in the record that the defendant knew, or had reason to believe, that Sanzo was in need of an alibi; and the jury was first required to find from competent evidence in the record that the defendant knew of the occurrence of the offense on August 14, 1952 at a distance of some sixty miles from the defendant's own community; and the jury was first required to determine from competent evidence in the record that the defendant knew, or had reason to believe, that Sanzo had been charged with and was then being tried for the commission of that offense. Concerning all of these elements the record in this case is strangely and completely silent.

Professor Wigmore, with his customary insight and clarity of expression, states the principle thus: *Wigmore on Evidence*, 3rd Ed., Vol. 2, Sec. 242:

> "The idea of criminal intent then usually partakes of deliberateness, knowledge, object and the like; its absence is often indicated by the ideas of mistake, good faith, reasonable belief and the like. * * *
>
> "Thus this distinct element in criminal intent consists not alone in the voluntary movement of the muscles, i.e. in action, nor yet in the knowledge of the nature of an act, but in the combination of the two—the specific will to act, i.e. *the volition exercised with conscious reference to whatever knowledge the actor has on the subject of the act.* * * *"

Thus, in the case at bar, *the alteration of the defendant's medical record which the Government claims to have established through its expert witnesses, can have utterly no value to prove the offense of perjury, unless the alteration was made in the light of knowledge on the part of the defendant that the alteration would have been of particular value to the patient.* Otherwise—if, in fact, there was an alteration, it could not possibly have been

made, as charged, for the purpose of supplying an alibi. In such event, the alteration was either inadvertent or it was correctly made. And, in this connection, it must be kept in mind that *there is no testimony in the record that Sanzo was not, in fact, present at the defendant's office on August 14, 1952.*

When the Government charged in this case that the defendant deliberately altered his record to provide Sanzo with an alibi, then it was incumbent upon the Government to offer competent evidence to prove that the defendant had knowledge of facts and circumstances which the defendant must have known and must have had in mind before he could formulate the specific will to act—namely, to alter his records—with reference to that knowledge.

By permitting this case to be submitted to the jury, the court permitted the jury to speculate or guess that the defendant "must have" known of the ocurrence of the crime in Warren, Ohio; that the defendant "must have" known that the case in which he was called to testify as a witness, involved that offense; that the defendant "must have" known that the date of August 14 was important to the defendant Sanzo in the trial of that case.

This conduct of the trial court was erroneous and prejudicial. The jury could not properly be permitted to speculate or to guess with reference to these circumstances which it was the duty of the Government to prove if there was any basis for the Government's charges.

The speculation into which the jury was necessarily and inevitably led by having submitted to it the issue of wilful and corrupt intent, is evidenced by the following inquiry made by the jury to the court in the course of its deliberation (444a):

"What date was Sanzo arrested?"

In affirming the action of the district court submitting this case to the jury, the Sixth Circuit Court of Appeals violated its own well established rule announced in the case of *Parker vs. Gulf Refining Co.*, 80 Fed. 2d. 795. Syl. 1:

> "Evidence which presents no more than a choice of probabilities, or which requires super posing of inferences, is not substantial evidence for submission to a jury."

In his opinion in that case, Judge Simon stated:

> "To submit to a jury a choice of probabilities is but to permit them to conjecture or guess, and when the evidence presents no more than such choice, it is not substantial."

This Court has many times denounced the submission of cases to the jury under such circumstances. In the case of the *United States vs. Ross*, 92 U. S. 281, this Court declared in its opinion:

> "No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed.
>
> "Starkie on Evidence, pg. 80, lays down the rule thus:
>
> > 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by *direct* evidence, as if they were the very facts in issue.' (Emphasis by the court.)
>
> "It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an

open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences."

In the case of *Pennsylvania R. R. Co. vs. Chamberlain*, 288 U. S. 333, 53 Supreme Court 391, this Court quoted with approval from the opinion of the Supreme Court of Massachusetts in the case of *Smith vs. First National Bank*, 99 Mass. 605, 611:

> "There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. * * * When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof."

A discussion of this subject cannot be concluded without some reference to the question of motive. It is remarkable that in a case of this kind no motive for the defendant's alleged infamous crime has either been claimed or attempted to be proved.

At no time during the entire period of more than five years, within which the doctor has repeatedly been required to defend himself against the charge of perjury, has the Government ever claimed that any motive whatsoever exists for the commission of this crime. The doctor's first professional contact with Sanzo was on August 12, 1952. He testified (p. 92a):

> "A. I had never seen Mr. Sanzo prior to that time. He was a total stranger to me, Mr. Picciano.
>
> Q. Total stranger. You didn't know him other than in a professional capacity?
>
> A. True."

There is not an iota of evidence in the record that the doctor ever saw or spoke with Sanzo except on a half dozen professional examinations that Sanzo was given at the doctor's office; or that the doctor ever spoke to or with any other person about Sanzo.

The F. B. I. which handled the investigation of this case had an extraordinary amount of time within which to prepare the strongest possible case for the Government. Four and a half years elapsed between the time the doctor gave his testimony in the Sanzo case and the date of the third trial of this indictment. Yet, the Government was unable to offer any evidence to prove either falsity or wilful and corrupt intent on the part of the defendant other than the testimony of two handwriting experts.

True, motive is not an essential element required to be proved in any criminal case, yet, in a case based upon such a record as that presented by the Government in the case at bar, the absence of any claimed motive, the absence of any evidence to indicate motive, coupled with the total absence of any evidence on the issue of intent combined to require the sheerest speculation on the part of the jury in order to arrive at its verdict.

CONFLICT OF OPINIONS AMONG THE CIRCUIT COURTS.

Although the opinion of the Court of Appeals in the instant case does not touch directly upon the issue, and although neither of the opinions of that court upon the two prior appeals contains any language touching directly upon the issue, it is clear that the effect of the decision and opinion of the court in this case is to affirm the proposition of law that upon a prosecution for perjury the jury may infer the existence of the wilful and corrupt intent of the defendant merely from evidence offered to prove falsity and in the absence of any other evidence whatsoever.

Such a stark declaration has never been made by this Court and, so far as we have been able to determine, nothing that has been said by this Court justifies such a rule. The Court of Appeals of the District of Columbia made such a statement in the case of *Young vs. U. S.*, 212 Fed. 2d 236. In its opinion at page 241, the court declared:

> "Generally, a belief as to the falsity of testimony may be inferred by the jury from proof of the falsity itself. In some cases, perhaps, this might not be so—as where the testimony concerned a triviality or an occurrence of long before."

This Court denied a writ of certiorari, *Young vs. U. S.*, 347 U. S. 1015, 74 Supreme Court 870. No cases supporting such a rule are cited in the opinion of the Court of Appeals in that case. To the opposite effect is the decision of the Second Circuit Court of Appeals in the case of *U. S. vs. Remington*, 191 Fed. 2d 246. In that case the court held in its opinion:

> "Since *the crime of perjury consists in the contradiction between the accused's oath and his belief*, the only direct evidence of his guilt would seem to be his own declarations of his belief, * * * but it is clear that perjury convictions are not limited to such cases.
>
> **"Hence it must be that the rule peculiar to perjury as to the character of the proof means that it is the facts from which the jury may infer the accused's state of mind that must be proved by direct evidence.** * * *
>
> "**False swearing** in signing the affidavit **must**, as in other cases **where mental state is in issue be proved by the outward manifestations of state of mind. In the absence of such manifestations * * * there can be no successful prosecution for false swearing.**
>
> American Communications Association vs. Douds, 339 U. S. 382, 411, 70 Supreme Court 674, 690.

"Hence the doctrine that perjury must be proved by the direct testimony of two witnesses or one corroborated witness means that the witness must testify to some 'overt act' from which the jury may 'infer' the accused's actual belief."

The tenor of the above decision is clearly that proof of falsity alone cannot be employed to establish the intent required by the statute. There must be proof of an overt act from which the jury may infer the guilty state of mind of the defendant. There is something required in addition to proof of falsity. Otherwise, said the court in the *Remington* case—

> "the rule would deprive the accused of the full protection which it is intended to afford him."

This Court in the *Douds* case, 339 U. S. 382, 70 Supreme Court 674, 690, recognized this problem and in the opinion written by Chief Justice Vinson, declared that "there can be no successful prosecution for false swearing" where the record is devoid of any evidence of the "*outward manifestations of state of mind*" of the defendant.

It seems apparent that the requirements which were discussed by this Court in the *Douds* case and which were so aptly interpreted and applied by the Second Circuit Court of Appeals in the *Remington* case, have been misinterpreted and misapplied elsewhere, as by the District Court of Appeals in the *Young* case and by the Sixth Circuit Court of Appeals in the case at bar.

The grave danger to which defendants may be exposed in perjury prosecutions as a result of the inculcation of courts with the generality of the rule pronounced in the *Young* case is classically illustrated by the tragic results suffered by the defendant physician in the case at bar.

In a comment upon the *Remington* case in 51 *Columbia Law Review*, 1056, the writer notes:

> "Although it has always been recognized that *the essential element of the crime of perjury is the contradiction between the defendant's statement and his belief at the time he made it*, courts formulated the rule of proof requiring direct evidence in perjury cases in terms of the actual falsity of the statement. Accordingly, they held that it was the falsity of the statement, rather than its conflict with the defendant's belief, which had to be proved by direct evidence."

The writer then notes with respect to the *Remington* case that:

> "In the instant case, the court emphasizes that one is guilty of perjury if he *believed* that his statement was untrue."

Another writer commenting on the *Remington* case, in 65 *Harvard Law Review*, 520, interprets the rule laid down by the court thus:

> "Held, that *since the crime consists of misrepresenting belief, of which there was no direct evidence here*, the rule requires that the charge point out appropriate evidence justifying a jury inference that defendant believed he had been a member."

This Court, in 1952, denied a writ of certiorari in the *Remington* case, 343 U. S. 907, 72 Supreme Court 580, in an order from which Mr. Justice Black and Mr. Justice Douglas dissented.

The court in the *Remington* case might well have emphasized not simply that the defendant would be guilty of perjury if he *believed* that what he was stating under oath was not true, but the court might well have added that the defendant would be guilty of perjury ONLY if he

believed that what he was stating under oath was not true.

If, in the instant case, the trial court and the Court of Appeals had given proper consideration to the rule announced in the *Remington* case, rather than to the generality—with its appended exception—alluded to in the *Young* case, the significance of the situation in the case at bar would have become immediately apparent.

There is in the record in this case, received as Government's Exhibit 6 (pp. 79a to 99a) the entire testimony of the defendant physician when he was summoned to appear as a witness in the Sanzo case. An examination of that testimony at once discloses that the doctor was at no time testifying from any independent recollection. It discloses that at all times the doctor was testifying only as his recollection was refreshed by what appeared on his office records. It discloses also that the doctor was testifying on the basis of his knowledge and experience concerning the manner in which his records were kept and entries made.

There is not one iota of evidence in the entire record to indicate that the date, August 14, as it appears on the doctor's medical record, was of any greater significance to the doctor than any other date on that record. It was simply a date upon which, according to the record, the patient was at the doctor's office for an examination. It was that, and nothing more than that.

There is not one iota of evidence in the record to indicate that the doctor had any knowledge of circumstances that this particular date, or this particular entry, was of special consequence to anyone. The doctor testified concerning the handwritten "4":

"It was put in by myself at the time of the visit. That happens often, the stamp is incomplete or fades and I write over it."

The language used by the doctor is surely significant and it is a part of the language which is included in the indictment as being false. The doctor did not say, "the stamp *was* incomplete"—"it *faded*, and I *wrote* over it"; on the contrary, he put his statement in the offhand manner in which any witness would put it who was simply giving a reason for his previous answer. His previous answer was, as set forth in the indictment:

"Q. Do you know what date was stamped over before that was written there?

A. It was the 14th.

Q. How do you know that?

A. It was put in my byself at the time of the visit. That happens often, the stamp is incomplete or fades, and I write over it."

When the doctor used the *present* tense, rather than the past tense, e.g. "the stamp *is* incomplete," "that *happens* often" "*write* over it" he was simply stating the practice in his office and testifying that from his knowledge of the method in which his records were kept, in effect: "I believe that *this* is what happened in *this* case."

In effect, the charge presented in the indictment that the answers given by the doctor to the few questions there quoted were knowingly false, takes these questions and answers entirely out of context when considered in the light of the entire testimony given by the doctor, for example (p. 97a):

"Q. Now, this record of times Mr. Sanzo was in, Government's Exhibit 31, is in addition to your appointment book, is that correct?

A. Mr. Steele, the answer to that is probably "no." It correlated the appointment book, you understand. *This is the date he was in, from my appointment book.*

Q. Could you tell the court and jury why you put on there 'return in 6 days'?

A. The reason is that *is* the duration of the action of the medication, and I *figure* in that length of time the therapeutic response has been achieved, that is, the response to the treatment achieved. It *is not unusual* for a patient to come in sooner or later.

Q. With reference to Government's Exhibit 31, who, if anyone, put the date of August 14th there?

A. That is my "4."

Q. Well, how about the date itself, the stamped date?

A. The stamped date was, in all probability, put on by my secretary.

Q. Which secretary?

A. I am referring to my daughter Madeline.

Q. The "4" there isn't the same as the "4" on August 14th.

A. That is correct, but *it is usual for me to do that*, frequently to change my fours around.

Q. Dr. Spaeth, can you tell the jury, referring to Government's Exhibit 31, when that figure "4" was inserted by you with reference to the visit made by Mr. Sanzo?

A. That was made on the date of its entry, the 14th.

Q. And was that after you had concluded your visit with him, or yet with him at the time?

A. I couldn't answer that question exactly. It could have been during or after. My records *are* sandwiched in between my medical practice."

Throughout his entire testimony the doctor was testifying only as to what his usual practice was—e.g.:

"the stamp *is* incomplete or *fad s* and I *write* over it."

"The stamped date was, in *all probability* put on by my secretary."

"It *is usual* for me to do that *frequently*, to change my fours around."

"*It is not unusual* for a patient to come in sooner or later."

"My records *are* sandwiched in between my medical practice."

The doctor's daughter was, at the time, her father's only secretary. She testified that during a busy day the doctor saw "around four patients an hour, that would be 32 a day. * * * We were usually very, very busy." She usually left the office with her father which was "as early as six and as late as eight or nine."

As to the manner in which the doctor's records were kept, she testified:

> "There was no definite time because my father was so often so busy, he couldn't be writing all the time. When one patient went out, if there were many waiting in the waiting room, he wouldn't have time to make the notation, and I would bring the next one in; and he would leave it for that evening or whenever he could possibly do it, or whenever it was humanly possible he would try to make it before the time the patient left."

She testified that on many occasions it wasn't even possible to complete the records on the same day.

Between the time that the doctor treated Sanzo in his office and the time he was summoned to appear as a witness in the Sanzo case, the doctor examined and treated approximately 3000 patients. The court in the *Young* case, while laying down the rule that: "Generally, a belief as to the falsity of testimony may be inferred by the jury from proof of the falsity itself" added the exception:

"In some cases, perhaps, this might not be so—as where the testimony concerned a triviality or an occurrence of long before."

We submit, with all of the vigor at our command, that so far as the doctor was concerned, the date of August 14th appearing on the medical record of a total stranger which was only one of approximately 12,000 entries a year, was nothing more or less than a triviality. It was a matter which was utterly and completely of no concern to the doctor, and it was a matter which the doctor had no reason to believe was anything more than a triviality in the case in which he was subpoenaed to testify.

By the same token, when the court in the Young case refers to "an occurrence of long before," this qualification must be read in the light of the circumstances under which the doctor's testimony was given. So far as the doctor was concerned, a single date on the medical record of a patient, when he had in the interim recorded some 3000 similar dates and entries on his medical records, was obviously "long before" the day on which he was subpoenaed to give his testimony. So far as the doctor was concerned, the date might as well have been entered on his record 3 years earlier instead of 3 months earlier. He would have had no more reason to remember the actual circumstance or to disbelieve what he observed on the medical record card.

If, therefore, the court in the instant case had undertaken to follow, as it should have followed, the rule pronounced in the *Remington* case, and had undertaken to point out to the jury what evidence there was in the record bearing upon the doctor's state of mind at the time he gave his testimony in the Sanzo case, the court would immediately have discovered that there was no evidence in the record to which the court could point as having a

bearing on this question. And with this analysis of the evidence, the court would immediately have been able to determine that there was no evidence to submit to the jury on one of the two essential elements in a perjury case.

Such an analysis, undertaken by applying the rule laid down in the *Remington* case, would have required the court to consider the following questions:

Assuming that there was either a stamped or a handwritten figure "8" under the handwritten "4" on Sanzo's medical record, as asserted in the opinions given by the Government's handwriting experts—

> Is there any evidence in the record that Sanzo was not in fact in the doctor's office on August 14, 1952? If there is no such evidence in the record, then is the evidence consistent with the belief of the doctor that Sanzo was in fact in his office on the date indicated by the record, namely, August 14th?
>
> Is there any evidence in the record that Sanzo was not in the doctor's office on August 14th? If there is none, then is the evidence in the record consistent with the fact that either a stamped or a handwritten "8" was first placed on the record by mistake and was then corrected to appear as August 14th; and, in that event, is the evidence consistent with the doctor's belief that August 14th was the original date inscribed on the record?
>
> Is there any evidence in the record to support an inference that when he gave his testimony the doctor had any particular reason to bear in mind the date of August 14th as it appeared on Sanzo's medical record? If not, is the evidence in the record consistent with the belief of the doctor that the record was not, in any way, altered by him, notwithstanding the fact that there had been an alteration?

> Is the evidence in the record consistent with a belief on the part of the doctor at the time he gave his testimony that the date of August 14th was the date originally placed on Sanzo's medical record? If the evidence in the record, comprising only the opinion testimony of handwriting experts is consistent with the doctor's belief that there had been no change of date in the disputed entry, is there any evidence in the record which the court could point out to the jury to support a finding that the doctor did not in fact believe his testimony to be true?

The answers to the foregoing questions would have immediately revealed that there was no evidence in the record which the court could submit to the jury.

Strangely, the court did recognize, although it failed to apply, the correct rule when the court stated in its charge (p. 412a):

> "Evidence of facts that are as consistent with innocence as they are with guilt, is insufficient to warrant a conviction."

In *Brown vs. U. S.*, Eighth Circuit Court of Appeals, 245 Fed. 2d 549, decided in 1957, the court held:

> "* * * and the burden is on the Government to prove the essential elements of the crime by substantial evidence excluding every other hypothesis than that of defendant's guilt. Probable or credible evidence is not enough. We believe that the defendant's answers relied on by the Government to sustain counts 1, 2, 3 and 7, taken in conjunction with what has been previously said, makes it obvious that the charge of perjury can only be sustained by the device of lifting a statement of the accused out of context and thus giving it a meaning wholly different than that which its context clearly shows. Fotie vs. U. S., 8th Cir. Court, 137 Fed. 2d 831, 842."

It is earnestly contended that this is precisely what was done by the Government in the case at bar. The indictment has lifted out of the context perhaps a half a dozen answers from the entire testimony of the defendant in the Sanzo case and has charged, without an iota of evidence to support its claim, that false testimony was given by the doctor knowingly and corruptly. The doctor's testimony, when read as a whole, fully bears out the fact that the answers alleged to have been knowingly false, in the *present* tense, were the best and, probably, the only answers that the doctor *could* have given in describing an occurrence which to him was surely nothing more than trivial.

THE QUESTION OF DIRECT EVIDENCE.

In the entire record there is no direct testimony to establish either the alleged falsity of the doctor's testimony or the alleged intent with which it was given.

The testimony of handwriting experts who offer their opinions and conclusions, based not upon a bare examination of a questioned document but based upon photographs and experimentation with the document itself, does not constitute direct testimony. There is a further significant circumstance that the opinions and conclusions of the expert witnesses for the Government were directly challenged and contradicted by an equally qualified and credible expert for the defendant.

Two individuals cannot *know* the correct answer to a single question if the answers given by them are diametrically opposite. When two expert witnesses present under oath their views with respect to a single subject matter, and the views so expressed cannot possibly be reconciled, at best the experts are not stating what they know but are

offering only their opinions and conclusions. Such opinions and conclusions are not direct evidence of any fact. In the case at bar, for example, direct testimony, to the effect that under the handwritten "4" on Sanzo's medical record there was either a stamped or a handwritten "8," could be supplied only by one who saw the figure 8 placed on the record. Such testimony would be direct testimony. A person who was not present when the medical record was prepared, who did not examine it until many months had elapsed, cannot give direct testimony with respect to anything that is on the record. This type of testimony was never contemplated as sufficient to satisfy the stringent requirements of proof in a prosecution for perjury.

In the case of *Weiler vs. U. S.*, 323 U. S. 606; 65 S. Ct. 548, Mr. Justice Black, writing the opinion of a unanimous court, observed:

> "The crucial role of witnesses compelled to testify in trials at law has impelled the law to grant them special considerations. In order that witnesses may be free to testify willingly, the law has traditionally afforded them the protection of certain privileges, such as, for example, immunity from suits for libel, springing from their testimony.
>
> "Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon 'an oath against an oath.'
>
> "The rule may originally have stemmed from quite different reasoning but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted."

By the same token it is submitted that *it is equally contrary to the policy of the law, extending to honest witnesses the privileges and the protection referred to in the opinion in the Weiler case, that the fate of such witnesses and their liability to conviction for alleged perjured testimony should be made to depend upon the outcome of a battle of experts, arrayed one against the other, in an endeavor to persuade the jury of the validity of their conclusions.* In an exhaustive study which has been undertaken, we have been unable to find a single perjury conviction which has heretofore been attempted, much less sustained, based solely upon the testimony of expert witnesses.

This contention has been advanced on behalf of the defendant since the first trial of this case. The only federal opinion of which we know declaring that the opinion testimony of an expert witness is not circumstantial evidence is to be found upon the first appeal of the case at bar, 218 Fed. 2d, 361, *Spaeth vs. U. S.* In that opinion the Court of Appeals stated:

> "It only remains to comment upon appellant's contention that his requested instruction that 'opinion evidence is in the nature of circumstantial evidence' should have been given. While it may often be true that opinion evidence involves the witness' making an inference on the basis of established circumstances, that was not the case here. The expert witnesses in this case did substantially no more than testify what physical fact their more practiced eyes observed. As a trained musician may more readily distinguish a minute differentiation of pitch, so the jury would have been warranted in believing that these experts were able to see subtle differences of intensity.
>
> "Their testimony as to their observations was therefore not circumstantial. * * *."

One difficulty with the view adopted in the above opinion by the Court of Appeals is that it is not based on anything that the record in this case discloses. Reference has been made heretofore several times in this petition to the prolonged and complicated examination and inspection of Government's Exhibit 31, the doctor's medical record, almost all of which was devoted not to a study of the record itself but to a study of photographs of the record and to an interpretation of the meaning of the results achieved in the taking of those photographs. That is a far cry from what the Court of Appeals undertook to describe as an examination of the card by the experts and testimony of "what physical fact their more practiced eyes observed."

It is one of the basic *physical* facts of this case that no one can *see* by looking at it what, *if anything*, was written or stamped under the disputed date on the doctor's medical record. The defendant's expert asserted repeatedly, both on direct and cross examination, that what the other experts believed they saw and referred to as a "round-bodied figure" was nothing more than an ink run. In this state of the record, and in the absence of an opinion by any other federal court, and with no expression by this Court to furnish a guide, we submit the following declarations and opinions as representative of what we believe to be the correct rule applicable in the instant case:

Morgan vs. State, 51 Neb. 672:

> "It would seem that a stream cannot rise higher than its source, and that the basis of his evidence and the foundation of his testimony is wholly circumstantial evidence, notwithstanding this expert may point out the peculiar characteristics existing in the same which might otherwise be unnoticed, and so explain

them that the jury may feel justified in accepting his conclusions. Yet the original evidence, the actual writings offered as proof, including his conclusions derived therefrom, must be and ever remain in the nature of circumstantial evidence."

Hoover vs. Hoover, 26 N. W. 2d, 98, Ia.:

"In general it can be stated that a person who is skillful in handwriting and the inspection of documents *may state his inference from appearances observed by him.*"

Muller vs. Neiland, 342 Ill. App. 240; 96 N. E. 2d, 360:

Syl. 3. "The testimony of a handwriting expert is, at best, secondary evidence and merely an opinion as opposed to a positive fact, and however expert the witness may be, he is not giving voice to any direct statement of facts capable of proof and only to an opinion."

What the Court of Appeals endeavored to state on the first appeal of this case was that the testimony of the Government's expert witnesses was not in fact opinion testimony. It is, of course, vital for the defendant in this case that this Court correct the error of the Court of Appeals in this pronouncement. *But it is equally vital that this Court make clear that whenever a litigant finds it necessary to produce as a witness an individual whom the litigant is required to qualify as an expert before the witness can be permitted to offer testimony concerning the issues before the court, in every such case whatever the witness may offer as his testimony is merely the opinion of the witness and nothing more.*

It is the conclusion which the witness draws either from a hypothetical statement of facts presented to him or from examination of documents or physical objects which the witness has examined or tested. In this case, neither

of the Government's two witnesses, Mesnig or Tholl, would have been permitted to testify on any subject pertinent to the issues, if they had not first been qualified as expert witnesses. This was an essential prerequisite before they could state to the jury anything whatever concerning the opinions and conclusions which they asserted. No other court anywhere has ever heretofore attempted to distinguish the conclusions and the inferences stated by an expert witness so as to invest his testimony with the dignity and the significance of direct evidence and to withdraw it entirely from the category of opinion testimony.

THE QUESTION OF THE REJECTION IN EVIDENCE OF DEFENDANT'S OFFICE RECORDS.

The defendant has, of course, maintained throughout the three trials of this cause, that he not only fully believed in the truthfulness of his testimony in the Sanzo case, but that he still believes implicitly that his testimony, as there given, was truthful.

Contending as he does that his only knowledge and recollection, upon the basis of which his testimony was then given, consisted of his observation of what his own medical records disclosed, and his knowledge of the usual and customary practice of making and keeping records in his office, the defendant offered in evidence a large number of his office records, an examination of which would immediately disclose the truthfulness of the answers given by the doctor which the Government alleges to be false.

These records disclose that the doctor was telling the truth when he stated that the impression made by his date stamp was frequently incomplete; the records disclose that the doctor was telling the truth when he stated that the impression made by the date stamp frequently faded; the

records disclose that the doctor was telling the truth when he stated that it was his custom or habit frequently to write over in ink the impression made by the date stamp.

The records disclose one other and extremely significant circumstance, namely, that on the doctor's medical records there were apparently many alterations of dates: from which an inference may clearly be drawn that the original date on the doctor's medical record was frequently carelessly or inaccurately placed thereon.

It is contended that the evidence offered was pertinent and relevant to support the doctor's contentions both with respect to the truthfulness of his testimony and with respect to his belief in its truthfulness.

Of course, the records were not offered for the purpose of establishing the correctness of any entry on such records; and whether or not the entries thereon were in fact correct could under no circumstances have become an issue in this case.

For this reason the trial court committed a grievous error when he rejected this evidence on the ground that the reception of it would involve the introduction into the case of collateral issues. Such collateral issues could only arise if the accuracy of the entries themselves could be drawn in dispute; but that was something with which the court and the jury in this case were in no way concerned.

The trial court thus deprived the defendant of one of the most valuable and pertinent items of evidence which the defendant was in a position to produce to support the truthfulness of his testimony in the Sanzo case.

Again we turn to the clear and rational expression of Professor Wigmore, who states the basis for this type of evidence, *Wigmore on Evidence*, Vol. 2, Sec. 302:

> "Without formulating any accurate test, and without attempting by numerous instances to secure

absolute certainty of inference, the mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but the oftener similar instances occur, with similar results, the less likely is the abnormal element likely to be the true explanation of them. * * *

"In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result * * * tends to establish the presence of the normal * * * and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated within a limited time and under given circumstances with an innocent intent."

Thus, in the case at bar, if the jury had been permitted to discover from an examination of the doctor's medical records that the date stamp was in fact many times incomplete, that the date stamp did on numerous occasions fade, that the doctor did on numerous occasions write over the date stamp, as he had testified, and that on many occasions the date written over was apparently changed—by the process of reasoning to which Wigmore refers, the jury could then properly arrive at a conclusion that what was done by the doctor in the entry of August 14, 1952, was as innocent and as devoid of any sinister motive and intent as all of the other entries made on his record in a similar manner.

Wigmore, Op. Cit. Vol. 2, Sec. 302, quotes the following pertinent statement from the English case of *Rex vs. Francis*, L. R. 2 C. C. R. 128:

"Coleridge, C. J.

"It seems clear upon principle that when the fact of the prisoner having done the thing charged, is

proved, and the only remaining question is whether at the time he did it he had a guilty knowledge of the quality of his act, or acted under a mistake, evidence of the class received must be admissible. It tends to show he was pursuing a course of similar acts * * *."

Blake vs. Assurance Co., L. R. 4, C. P. D. 94:

"*Where the act itself does not per se show its nature, the law permits other acts to be given in evidence for the purpose of showing the nature of the particular act.*"

Certainly, in the instant case, the mere placing of a handwritten numeral "4" on the doctor's medical record is an act which itself "does not per se show its nature." Accordingly, the doctor should have been permitted to show "other acts to be given in evidence for the purpose of showing the nature of the particular act," which was entirely innocent.

22 *C. J. S.* 928:

"Evidence of habit or custom is admissible to show conduct on a particular occasion."

Stanton vs. Morrison Mills, Inc., 94 N. H. 92, 47 Atl. 2d 112, Syl. 2:

"That a person has previously done an act in a particular way tends to prove that he did the same act in the same way at the time in question."

Walker vs. Citizens National Bank of Waco, 212 S. W. 2d 203, Syl. 7:

"The habit or custom of a person in doing a particular act often has probative value in determining his conduct on an occasion in question."

THE QUESTION OF THE UNLAWFUL SEIZURE OF DEFENDANT'S MEDICAL RECORD.

This entire prosecution was inspired by and was based upon an unlawful seizure by agents of the Federal Bureau of Investigation of the doctor's medical record which he was impelled by subpoena to bring with him to court as a witness in the Sanzo case.

We have previously described how during the course of the trial of that case this record was seized by agents of the Federal Bureau of Investigation, was surreptitiously withdrawn and removed from the presence and the jurisdiction of the court, how it was then taken to the office of the bureau in Washington where it was subjected to being photographed, tested, checked and examined, how all of this was done without the knowledge, the consent or the authority of the district court in the city of Cleveland.

The Sixth Circuit Court of Appeals referring to this conduct of the F. B. I. agents, in an appeal taken by Sanzo to that court, *Sanzo vs. United States*, 210 Fed. 2d 49, commented in its opinion:

> "It was improper to send that exhibit out of the jurisdiction without application to and approval by the court."

The court, however, concluded that this conduct, although improper, was not prejudicial to the defendant Sanzo. However, an entirely different situation is presented in the case at bar. When the Government succeeded in procuring a conviction of Sanzo, it immediately read into the testimony of the doctor a wicked and sinister although utterly motiveless, intent. When the case of *United States vs. Sanzo*, had been finally concluded, the doctor's medical record which had been brought into the Court during the trial of that case, but only for the pur-

pose of the trial of that case, was not returned to the doctor. In fact, although its return to *him* was refused, the F. B. I. agents apparently had no difficulty whatever in again unlawfully seizing the defendant's document and in again removing the same from the jurisdiction of the district court. This, too, was done without resorting to any legal process, without procuring the order of any court, and without the consent of the defendant.

It is established law that a man's papers are as much protected from, and are as immune to, unlawful seizure, as are his home and his person. *The doctor's appearance as a witness during the trial of the Sanzo case was compulsory, his production of his medical record was compulsory, and his act in leaving the record in the custody of the court was compulsory.*

The relinquishment of the record into the custody of the district court was limited to the purpose for which it was required in the trial of the case for which it was produced. At the conclusion of that trial, the record had fully served the purpose for which it had been produced. It was then still in the custody of the district court. It was not the property of a litigant.

It is submitted that when documents which have been received in evidence have fully served their purpose as such, and the documents are not the property of a litigant in the case, the witness to whom the documents belong and who was compelled to produce them, has an absolute right to demand that they be returned to him.

There is a remarkable and seemingly a complete dearth of authority on this subject. Apparently the Government has not heretofore attempted to employ in a criminal prosecution evidence which is the property of the accused, and which the Government has unlawfully

seized from the custody of some court into which it has been compulsorily entrusted by the accused.

The first step taken by the defendant in this case, after the service upon him of the indictment, was the filing of a motion for the return of his medical record. Subsequently, on all appropriate occasions, motions for the suppression of this document as evidence were offered, and when the Government, upon the trial of this case, sought to introduce the document in evidence, an objection was interposed on the ground that it had been seized in violation of the defendant's constitutional rights.

Perhaps the leading case on this subject is the decision of this Court in *Boyd vs U. S.*, 116 U. S. 616:

> Syl. 3—"It does not require actual entry upon premises, and search for and seizure of papers, to constitute an unreasonable search and seizure within the meaning of the Fourth Amendment; a compulsory production of a party's private books and papers to be used against himself or his property in a criminal or penal proceeding or for a forfeiture, is within the spirit and meaning of the Amendment."
>
> Syl. 6—"The seizure or compulsory production of a man's private papers to be used in evidence against him, is equivalent to compelling him to be a witness against himself, and in a prosecution for a crime, penalty or forfeiture, is equally within the prohibition of the Fifth Amendment.
>
> Syl. 9—"Constitutional provisions for the security of person and property should be liberally construed."

The following comments in the opinion of this Court in the *Boyd* case support the defendant's contention in this case:

> "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a

criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure. * * *

'*Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection;*' * * *

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of life.

"It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

"Breaking into a house and opening boxes and drawers are circumstances of aggravation; but *any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime* or to forfeit his goods, *is within the condemnation of that judgment.* In this regard the Fourth and the Fifth Amendments run almost into each other."

After a lengthy discussion of the history of the Fourth and Fifth Amendments, this Court continued its opinion in the *Boyd* case as follows:

"We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment.

"And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms."

Later, in the same opinion, this Court added the following observations which are surely most significant and pertinent in the circumstances of the instant case;

"Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence and affects their substantial purpose. *It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.*

"This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property shall be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitu-

tional rights of the citizen, and against any stealthy encroachments thereon."

Does not the Court find, in the facts of this case, circumstances which fall directly within the principles, the warnings and the pronouncements of this Court in the *Boyd* case?

Does not the medical record of the doctor's patient constitute a private paper of the defendant?

Was it not compulsorily seized from his possession in the name of the United States of America by the United States District Court in Cleveland?

Was it not surreptitiously seized and removed from the custody and jurisdiction of that court by the agents of the Federal Bureau of Investigation, and following the termination of the Sanzo case, was it not again seized, surely without the knowledge and consent of the doctor, from the custody of the court into whose hands the defendant herein had been compelled to entrust it?

Does the Fourth Amendment to the Constitution of the United States protect the defendant against the compulsory seizure of his private papers only when those papers are seized by the Government directly in the case in which they are sought to be employed against him?

Such is neither the language nor the tenor nor the import of the Fourth Amendment. Rather, as stated by this Court in the *Boyd* case, it may be that the seizure of the doctor's papers by subpoena duces tecum in the Sanzo case "is the obnoxious thing in its mildest and least repulsive form."

It may be that the seizure of the doctor's papers was first accomplished in a legitimate manner, taking into consideration *the limited purpose and scope of the right which was exercised by the Government to place those papers in the custody of the court as evidence in the trial*

of a lawsuit with which the doctor was in no way concerned. But it is strongly urged and contended that the continued seizure and continued custody of the doctor's private papers after they had served their purpose, as evidence in the Sanzo case, and after the limited use for which they had been seized had been satisfied and discharged, thereafter constituted an unreasonable seizure and an unlawful seizure, and a seizure by which the Government of the United States violated the doctor's fundamental rights and privileges accorded to him under the provisions of the Fourth Amendment to the Constitution.

It does not require great imagination to conjure up an infinite variety of proceedings by means of which a man's private papers may be lawfully but compulsorily removed from his possession by an agency of the Government in a proceeding in which he has no personal interest and with which he is in no manner personally concerned.

This appears to be the first case in which such a device has been successfully employed by the Government; certainly, it becomes a classic example of the manner in which, as stated by this Court in the *Boyd* case, "illegitimate and unconstitutional practices get their first footing * * * namely by silent approaches and slight deviations from legal modes of procedure." But this Court need not concern itself necessarily with the infinite multiplication and variations of the device here employed in order to determine to scotch such methods at the outset.

It is of little consequence to the defendant in this case what similar device the Government may attempt to employ to assist in the prosecution of other persons hereafter. It is of no comfort to the doctor, when he seeks merely the benefit of the privilege and protection afforded him by the Fourth and Fifth Amendments to the Constitution of the United States, that he be told, in effect:

"It is true that your medical record was compulsorily seized from your possession by a form of process issued by the Government; it is true that you had no choice but to surrender your private papers into the custody of the U. S. District Court; it is true that you had no interest whatsoever in the case wherein your papers were compulsorily seized; it is true that those papers have been used against you in this case as a basis for the prosecution which the Government has instigated; it is true that the Government could not directly seize those papers and attempt to use them against you in this case.

But we are, nevertheless, constrained to hold that because those papers were seized by a form of process authorized by law, and, notwithstanding that process was entitled to be used for a limited purpose only, nevertheless we will not extend to you under such circumstances the protection to which you would otherwise be entitled under the provisions of the Fourth and the Fifth Amendments."

If this Court so determines, either upon a final consideration of this case upon its merits, or by simply declining to consider this case at all and denying this defendant's petition for a writ of certiorari, the Government will then have surely and clearly accomplished by indirection, but nevertheless by compulsion, precisely what the Fourth and the Fifth Amendments forbid and what this Court has on many other occasions proscribed.

We think it will serve no useful purpose in this petition to encumber this presentation with quotations from further decisions of this Court. Accordingly, reference is made simply to the following, among many, pertinent to the defendant's contention.

Weeks v. U. S., 232 U. S. 383, Supreme Court :
Silverthorn Lumber Co. vs. U. S., 251 U. S. 385, 40 Supreme Court 182.

CONCLUSION.

In this situation a fearful responsibility falls upon the shoulders of counsel representing an upright, honorable citizen of unblemished reputation for honesty and integrity, one of the leaders of this community in the practice of medicine who is innocent of the commission of any crime, but who has been convicted of a shameful offense.

Admonitions of wiser and more experienced counsel have been freely offered that the Supreme Court of the United States is a court of law, and that on more than one occasion the Justices of the Court have emphasized this designation, as distinguished from a court of justice.

Counsel have been admonished that to procure the allowance of the writ which is here being sought, it is not sufficient to demonstrate that the petitioner is in fact innocent of the offense of which he has been convicted; it is not sufficient to demonstrate that there was in fact no case which could properly have been submitted for the determination of a jury.

We have, nevertheless, been constrained to the conclusion that we have best served the interests of our client in first demonstrating that the proof offered on behalf of the Government was wholly lacking in evidence sufficient to prove the commission of any crime and that the jury was not only permitted to, but was required to, engage in speculation and guess-work and the piling of inference upon inference in order to arrive at a verdict of guilty.

We have been constrained to the hope, as well as to the belief, that for an upright citizen who finds himself in this tragic position, the court will perhaps be more certainly persuaded to grant the petition and to consider the merits of the important legal and constitutional questions involved in this case.

It is for this reason that counsel have reversed the usual order of presentation of the questions presented and reserved for the conclusion of the argument a discussion of the stark violation of the petitioner's rights under the Fourth and Fifth Amendments in the forcible seizure by the Government of the petitioner's medical record, which he had been compelled to produce and to entrust to the custody of the United States District Court.

It is scarcely short of incredible that so many basic propositions of law could have been overlooked, distorted and misapplied in a single case, with such a tragic result.

> "It has always been recognized that the essential element of the crime of perjury is the contradiction between the defendant's statement and his belief at the time he made it." 51 *Col. Law Review* 1056.
>
> "The crime consists of misrepresenting belief * * *." 65 *Harvard Law Review* 520.

What recourse is available to a defendant if the Government is wholly unable to offer proof of this basic and essential element of the crime, but the court nevertheless submits the case for the consideration of the jury?

The Government attempted to prove only that there was a stamped or a handwritten "8," or a stamped and a hand-written "8" which the handwritten "4" on the defendant's record concealed. *Without speculation and guess-work the Government's case was incomplete because the act of writing a "4" over a "6" or an "8" on the petitioner's medical record was simply an act which "itself does not per se show its nature."*

Overlooked entirely is the fact that on the evidence in this case the "4" may well have been the correct date. Overlooked entirely is the fact that an upright citizen and a physician at the top of his profession does not wilfully

alter his records and wilfully commit perjury for no motive and for a total stranger.

Overlooked entirely is the obvious consideration (could one call it minor?) that an alibi sought to be provided by a physician in the form of an office record would be simply accomplished by the preparation of a fresh record to that end rather than one which, on its face, directs special attention to the entry of the disputed and vital date.

Overlooked entirely is the circumstantial nature of the opinion evidence of handwriting experts and the complete absence of any other evidence in the record bearing upon either of the essential elements of the crime.

Overlooked entirely is the refusal of the trial court to permit the petitioner to prove by documentary evidence the honesty of his belief in the truthfulness of his own testimony.

Implicit in these circumstances are questions of law of broad significance vitally affecting the future administration of criminal justice in prosecutions for an offense which, in recent years and now, is becoming of increasing concern, particularly to the Federal courts.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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